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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 677

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ and ABRAHAM M. SENDEROWITZ, individually and as co-partners trading as ROYAL MANUFACTURING COMPANY,

Petitioners,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator.

No. 678

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ and ABRAHAM M. SENDEROWITZ, individually and as co-partners trading as ROYAL MANUFACTURING COMPANY,

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REPLY BRIEF FOR PETITIONERS

JULIUS M. RAPOPORT,
Attorney for Petitioners.

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I

Respondent, in substance, concurs in petitioners' request for a writ of certiorari.

The respondent, in his brief, cites *Collins et al.* v. *Fleming* (not yet reported) as being in conflict with the decision of the Third Circuit Court of Appeals in the instant case,

as well as with the decisions of the Eighth and Ninth Circuit Courts in *Martini* v. *Porter,* 157 F. (2d) 35, and *Porter* v. *Kramer,* 156 F. (2d) 687, and correctly concludes that "resolution of the conflict, therefore, is sufficiently important to warrant review of the question by this Court" (see p. 17 of respondent's Memorandum). Petitioners contend it would constitute only a partial presentation of the reasons for the granting of certiorari were we to omit the no less significant circumstance that, in view of the pending suit for treble damages, capable of continuation and enforcement by the Administrator, petitioners will, *unless this Court takes this case,* be deprived of their property without due process of law, in violation of their constitutional guarantees.

It should be noted that the need to resolve the demonstrated conflict in decision and to prevent an invasion of petitioners' constitutional rights is not diminished by any argument set out in the respondent's Memorandum. It is not the case, as the respondent argues (pp. 17 and 18 of his Memorandum), that this Court would be confined to a determination of whether or not the lower Court had jurisdiction to pass upon the validity of the questioned regulation. The issue is not a jurisdictional one. The fundamental question concerns the assumption and use by the Administrator of powers nowhere vested in him by the statute—either directly in so many words, or by necessary implication. The self-originated powers which the Administrator purports to exercise are: (1) The power to make a retroactive order long after the suit was instituted; and (2) The power to maintain the suit based upon the retroactive order to recover treble damages even before your petitioners were accorded the opportunity of testing the validity of the regulation in the Emergency Court of Appeals.

Moreover, the conduct of the Administrator in this case, the utilization by him of the lower Courts to collect treble damages for the assumed violation of a retroactive order, the validity of which has not yet been established, offers to your petitioners the uncomfortable assurance that the respondent will continue to pursue his course of abusive

discretion, already clearly demonstrated, unless this Court intervenes to put a stop to such action. Thus, there lies in the immediate offing the very real and contiguous probability that the Administrator will seek enforcement of the treble damage suit, irrespective of any determination by the Emergency Court of Appeals. We respectfully submit that due process of law, under our Constitution, requires this Court to intervene, where, as here, an Administrator seeks to compel a citizen, lawfully carrying on business in the United States, to face such coercive alternatives. Indeed, in so suggesting, we urge this Court to do no more than it has already forcefully indicated in the *Yakus* case, 321 U. S. at page 434, to wit, invoke and exercise its corrective authority where continued abuse of power by the Administrator trenches upon constitutional privilege. It is too early to forget that the pattern of due process afforded by the Emergency Price Control Act skirted upon the fringes of unconstitutionality; and this Court, to salvage that provision of the statute from such a taint, was at pains to point out that it would intervene to prevent such abuses of discretion, or unlawful arrogation of power. Mr. Chief Justice Stone, speaking for the majority, stated in that respect:

> "For the purpose of this case in passing upon the sufficiency of the procedure on protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence, we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously, we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he

would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes."

We need not indulge in any assumption here that the Administrator *would* "fail in the performance of any duty imposed on him by the Constitution and the laws of the United States". Regrettably, he has already failed in that regard by fashioning for himself powers not granted to him by Congress.

It should be further noted that enforcement of the judgment below would constitute a final determination of the validity of the order by the Administrator through the instrumentality of the Courts, and would thus do violence to the rule of this Court in *Morgan, et al.* v. *United States, et al.,* 304 U. S. at page 1, which established that due process forbids any Administrator from making a final determination against a party without giving him a fair opportunity to be heard.

That the respondent's argument on the ex post facto issue (see pp. 10 and 11 of respondent's Memorandum) is without merit is plainly affirmed by the well-settled proscription, firmly established by leading authorities, against the deprivation of fundamental rights based upon conduct antedating the penalizing statute. (*Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277; *Pierce* v. *Corskadon,* 16 Wall. 234; *Cooley, Constitutional Limitations* (7th Ed., 1903), 375, 376; *Black, Handbook of American Constitutional Law* (1927), Section 266; *Blackstone, Commentaries* (3rd Ed.), 11 n.; *McAllister, Ex Post Facto Laws in the Supreme Court of the United States* (1927), 15 Cal. Law Review, 269, 281-2.)

In sum, the proceedings against these petitioners, viewed in their completeness, constitute a gross and cumulative abuse of due process.

Respectfully submitted,

JULIUS M. RAPOPORT,
Attorney for Petitioners.